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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

BRIEF
FOR APPELLANT HAWAIIAN AIRLINES, INC.

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March 1983

QUESTION PRESENTED

Whether a state tax of a specified percentage of gross income from the airline business violates a provision of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513) that prohibits states from levying a tax, directly or indirectly, on gross receipts derived from the carriage of persons traveling in air commerce or the sale of air transportation.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Hawaii Supreme Court were Hawaiian Airlines, Inc. and the Director of Taxation of the State of Hawaii. This proceeding was consolidated in that court with *In the Matter of the Tax Appeal of Aloha Airlines, Inc.* (Hawaii Supreme Court Case No. 7078). The parties to the latter proceeding were Aloha Airlines, Inc. and the Director of Taxation of the State of Hawaii.

The United States of America appeared in the Hawaii Supreme Court as amicus curiae and filed briefs as amicus curiae in the Hawaii Supreme Court and in this Court prior to consideration of the Jurisdictional Statements herein in support of the position of Hawaiian Airlines, Inc. and Aloha Airlines, Inc.

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Hawaii Supreme Court (J.S. App. A-1)[1] and dissenting opinion (J.S. App. A-26) are reported at 65 Haw. 1, 647 P.2d 263 (1982). The judgment of the Hawaii Supreme Court (J.S. App. A-35) and the decision and judgment of the Hawaii Tax Appeal Court (J.S. App. A-28) are not reported.

[1] "J. S. App." refers to the appendix to the Jurisdictional Statement in No. 82-586.

JURISDICTION

The judgment of the Hawaii Supreme Court (J.S. App. A-34), sustaining the validity of the public service company tax imposed on airlines by Hawaii Revised Statutes Section 239-6 against a challenge based on the Constitution (Article VI, [illegible]se 2) and laws (49 U.S.C. § 1513(a)) of the United States, was entered on July 7, 1982. The notice of appeal (J.S. App. A-37) was filed with the Hawaii Supreme Court on August 6, 1982. Timely docketing of this appeal was effected on October 4, 1982, which date is within ninety days after the Hawaii Supreme Court's entering of judgment as required by 28 U.S.C. § 2101(c). Probable jurisdiction was noted by this Court on January 10, 1983. The time for filing this brief was extended on February 8, 1983 to March 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 7(a) of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, reads, in part:

> State Taxation of air commerce
>
> Prohibition; exemption
>
> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> Permissible State taxes and fees
>
> (b) [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes,

> net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . .[2]

Hawaii Revised Statutes Section 239-6 reads, in part:

> **Airlines, certain carriers.** There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students . . ., the tax shall be three per cent of its gross income each year from the airline business . . . .

The Supremacy Clause of the United States Constitution (Article VI, clause 2) reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant statutory provisions at issue here are set forth in full in Appendix A to this brief.

STATEMENT OF THE CASE

The question in this case is whether a statute of the State of Hawaii (HAW. REV. STAT. § 239-6) which levies a tax of a specified percentage of the gross income of airlines carrying passengers between islands of the State of Hawaii is prohibited by a provision of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513) and the Supremacy Clause of the

[2]The statute is quoted as amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 701. As explained hereinafter (*infra* at 27-30), the changes to 49 U.S.C. § 1513 effected thereby are relevant herein only as a reconfirmation of Congressional intent to prohibit the taxes enumerated in 49 U.S.C. § 1513(a).

United States Constitution. The material facts are not in dispute.

Hawaiian Airlines, Inc. ("Appellant")[3] is a commercial airline that carries passengers, property and mail between islands of the State of Hawaii. (J.A. 14-16). All of Appellant's regularly scheduled flights pass over international waters. (J.A. 27). Appellant operates under a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board ("CAB") and is authorized to carry and does carry United States Mail under that certificate. (J.A. 16). Appellant also is subject to regulation by the CAB. *(Id.)* For the period 1974-1978, more than 60% of Appellant's passenger gross receipts were realized from passengers traveling to and from Hawaii on other carriers from points outside of Hawaii. (J.A. 24-25). Appellant maintains 13 permanent ticket offices outside of Hawaii. (J.A. 28).

As an airline operating between airports in the State of Hawaii, Appellant is subject to the Public Service Company Tax imposed by Hawaii Revised Statutes Section 239-6 (the "PSC tax"). The PSC tax is computed as a percentage of Appellant's gross income each year from its airline business.[4]

In 1978, Appellant filed amended PSC tax returns seeking refunds of all PSC taxes paid in calendar years 1974 through 1978 on its gross receipts from the transportation of passengers

[3]Appellant has no parent or affiliate companies. Appellant has no subsidiary companies other than wholly-owned subsidiaries.

[4]HAW. REV. STAT. §§ 239-2, 239-6 (1976 & Supp. 1982). The PSC tax rate is four percent, or three percent in the case of an airline adopting a special rate schedule for carriage of students. Appellant has adopted the statutory special rate schedule and thus the PSC tax assessments at issue herein were three percent of Appellant's gross income. The PSC tax assessments herein "are measured by the Taxpayer's gross receipts from the carriage of passengers by air between airports on islands of the State of Hawaii, over international waters." Stipulation of Facts in the Hawaii Tax Appeal Court ¶ 5. (J.A. 15-16).

on the ground that such taxes are prohibited by 49 U.S.C. § 1513 and the Supremacy Clause of the United States Constitution. The Hawaii Director of Taxation summarily denied Appellant's claim for refund and Appellant perfected a timely appeal to the Hawaii Tax Appeal Court.[5]

The Tax Appeal Court ruled that the PSC tax was not prohibited by 49 U.S.C. § 1513.

Appellant perfected a timely appeal to the Hawaii Supreme Court. The principal issue argued and briefed before the Hawaii Supreme Court was whether the PSC tax was prohibited by 49 U.S.C. § 1513 and the Supremacy Clause. The Hawaii Supreme Court affirmed the judgment of the Tax Appeal Court.

The Hawaii Supreme Court reviewed the legislative background of the Airport Development Acceleration Act of 1973 (the "1973 Act") before turning to the language of the statute itself. The court observed that two acts of Congress that preceded the 1973 Act were passed to expand and improve the nation's airport and airway system.[6] The court noted that:

> [t]he Development Act declared a Congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. (J.S. App. A-10).

The court pointed out that, to finance the desired expansion and improvement of the national airport and airway system, certain taxes were increased and others imposed, and a trust fund was established as a repository of the revenue collected. The court also noted that Congress was reconsidering this

[5]The Hawaii Director of Taxation subsequently assessed Appellant for PSC taxes for calendar year 1979. Appellant also appealed this assessment to the Tax Appeal Court, and the two tax appeals were consolidated.

[6]The two acts were the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, tit. I, 84 Stat. 219 and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, tit. II, 84 Stat. 236.

statutory scheme in its deliberations on the 1973 Act, due to the need to increase funding of the system and to prohibit certain taxes.

The Hawaii Supreme Court commenced its statutory analysis by conceding that the PSC tax is literally prohibited by subsection (a) of 49 U.S.C. § 1513:

> Read literally, the subsection [subsection (a) of § 1513] decrees a federal preemption of the entire field of commercial aviation taxes. (J.S. App. A-13.)

But the court next asserted that subsection (b) of § 1513 "demonstrates that Congress could not have intended so broad a preemptive sweep." *Id.* According to the court, this was the case because subsection (b):

> permits the levy and collection of state and local taxes *other than those enumerated in subsection (a)* . . ., including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services. (J.S. App. A-13, emphasis added.)

The Hawaii Supreme Court's interpretation of 49 U.S.C. § 1513, then, is based on a premise that there are "seeming contradictions" between subsections (a) and (b) of 49 U.S.C. § 1513 and thus:

> Our task then is to harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b). (J.S. App. A-14.)

This "seeming contradictions" premise led the court to a four step examination of whether 49 U.S.C. § 1513 evidenced a "clear and manifest purpose of Congress" to displace state law, a finding of which the court believed necessary to permit 49 U.S.C. § 1513 to displace the PSC tax under the Supremacy Clause of the United States Constitution. (J.S. App. A-18.)

The first step in the examination was a reiteration of the "seeming contradictions" premise. As a second step, the court resorted to the legislative history of 49 U.S.C. § 1513 and determined, by interpretation of selected portions thereof, that the object of 49 U.S.C. § 1513 was merely to preclude state taxes (such as head taxes) imposed on passengers and other users of the aviation system but not taxes on airlines. This step was necessary because an inference of "a pervasive federal scheme . . . barring the collection of all State taxes touching air transportation" could not be drawn by the court due to its "seeming contradictions" premise. As step three, the court reviewed the PSC tax and its legislative history and concluded that the PSC tax was imposed on airlines, not on passengers or other users of the aviation system. Fourth and finally, the court necessarily concluded that there was no irreconcilable conflict between the federal prohibition and the PSC tax and, therefore, that the PSC tax was not prohibited by 49 U.S.C. § 1513 and the Supremacy Clause.

The court also noted its agreement with the Hawaii Legislature's characterization of the PSC tax as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value" (HAW. REV. STAT. § 239-6) and that the PSC tax has "some attributes" of a property tax, but stopped short of holding, as the Hawaii Tax Appeal Court had held (J.S. App. A-30), that the PSC tax was a property tax.

The dissent succinctly disagreed with the majority's holding that the PSC tax was not prohibited, as follows:

> In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):
>
> > No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .

prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant case.

U.S.C. § 1513(b) provides: "Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes . . .", and HRS § 239-6 provides: "The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value, and is in lieu of the tax imposed by chapter 237 [General Excise Tax Law] but not in lieu of any other tax."

I do not think that mere characterization of the tax as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value," changes the essential nature of the tax as a tax "on the sale of air transportation or on the gross receipts therefrom."

At the present time, the State of Hawaii has no personal property tax as such, and there was none at the time HRS § 239-6 was enacted.

Under HRS § 239-6, the sole basis for determining the amount of the levy or collection is the gross income from the airline business. Such basis has no relationship to the value of the personal property used in the airline, tangible and intangible, including the going concern value. (J.S. App. A-26.)

SUMMARY OF ARGUMENT

1. 49 U.S.C. § 1513 clearly and unambiguously prohibits the imposition of taxes such as the PSC tax "on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." This prohi-

bition applies both to subjects of state taxation (*i.e.*, persons traveling in air commerce, carriage of persons traveling in air commerce, sale of air transportation) and to a measure of state taxation (gross receipts derived from such activities). The PSC tax on gross income from the airline business is levied "directly or indirectly" on the prohibited subjects (persons traveling in air commerce or the carriage of persons traveling in air commerce or the sale of air transportation) and on the prohibited measure (*i.e.*, the gross receipts derived from such activities) and, therefore, is prohibited by subsection (a) of 49 U.S.C. § 1513. Subsection (b) of 49 U.S.C. § 1513 unmistakably defers to subsection (a) of such section, so that taxes permitted by subsection (b) are limited to taxes "other than those enumerated in subsection (a)." Since the PSC tax is "enumerated in subsection (a)", it is not permitted by subsection (b). The decision below disregards this plain meaning of 49 U.S.C. § 1513.

2. The legislative history of 49 U.S.C. § 1513 confirms that Congress intended to prohibit state taxes on gross receipts of airlines such as the PSC tax.

3. 49 U.S.C. § 1513 was enacted by Congress as a part of a national system of taxation and support of airport and airway development. The concept was to provide funds for such development through taxation and protection of the funding base through taxing prohibitions, all in the interest of an economically viable and safe national air transportation system. The decision below disrupts this national system.

4. The amendment of 49 U.S.C. § 1513 by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 reconfirms Congress' commitment to the national system of airport and airway development of which 49 U.S.C. § 1513 is a part and the careful balancing of federal and state interests inherent therein, thereby confirming the prohibition of state taxes such as the PSC tax by 49 U.S.C. § 1513.

ARGUMENT

1. THE HAWAII DECISION IGNORES THE PLAIN MEANING OF 49 U.S.C. § 1513.

The starting point in determining the meaning of a federal statute is the language of the statute itself. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981). The language of 49 U.S.C. § 1513 prohibits the PSC tax.

Subsection (a) of 49 U.S.C. § 1513 ("Subsection (a)") prohibits the levy or collection by any state of

> a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .

The broad sweep of the language of the statute is significant. It applies to all conceivable governmental exactions (*i.e.*, to taxes, fees, head charges and other charges). It broadly defines the categories of exactions forbidden. By its terms, no tax, fee or charge may be imposed on "persons traveling in air commerce," "the carriage of persons traveling in air commerce," "the sale of air transportation," or "the gross receipts derived

therefrom."[7] Taxes either "directly or indirectly" on such persons, carriage, sale or gross receipts are prohibited. Subsection (a) thus prohibits both subjects (*i.e.*, persons traveling in air commerce, the carriage of persons traveling in air commerce, and the sale of air transportation) and a measure (*i.e.*, gross receipts derived from persons traveling in air commerce, the carriage of persons traveling in air commerce or the sale of air transportation) of state taxation. The clear and unambiguous language of Subsection (a) provides more than ample justification for the statement of the court below that

> [r]ead literally, the subsection decrees a federal preemption of the entire field of commercial aviation taxes. (J.S. App. A-13.)

The language of Subsection (a) prohibits the PSC tax in several ways. The PSC tax is prohibited as a tax "directly or indirectly" on persons traveling in air commerce, the carriage of persons in air commerce or the sale of air transportation. The PSC tax is further prohibited as a tax "directly or indirectly" on

[7] *See* 49 U.S.C. §§ 1301(4), 1301(23)(a) (1976 & Supp. IV 1980) ("air commerce" defined for purposes of 49 U.S.C. § 1513 to include certain intrastate air carriage as well as the carriage of persons and property by air between places within any state "over any place outside thereof"); 49 U.S.C. §§ 1301(10), 1301(24)(a) (1970 & Supp. 1982) ("air transportation" defined for purposes of 49 U.S.C. § 1513 to include the transportation of persons and property by air between places within any state "over any place outside thereof"); Island Airlines, Inc. v. Civil Aeronautics Board, 352 F.2d 735 (9th Cir. 1965) (holding the international waters between the islands of the State of Hawaii are a "place outside thereof" for purposes of 49 U.S.C. § 1301). In 1978, Congress confirmed that inter-island air transportation over the international waters between the islands of the State of Hawaii is operation in "interstate or overseas air transportation." *See* 49 U.S.C. § 1305(b)(2) (Supp. IV 1980), added by Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978). *See also* Stipulation of Facts in the Hawaii Tax Appeal Court ¶ 5 (J.A. 15-16), wherein Appellant and the Hawaii Director of Taxation have stipulated for purposes of this case that PSC tax assessments "are measured by the Taxpayer's (Appellant's) gross receipts from the carriage of persons by air between islands of the State of Hawaii over international waters."

the gross receipts derived from such activities. This plain meaning of the language of Subsection (a) was disregarded by the decision of the Hawaii Supreme Court.

The PSC tax does not escape prohibition under Subsection (b) of 49 U.S.C. § 1513 ("Subsection (b)"). Subsection (b) specifically defers to Subsection (a) by providing that:

> (b) [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a)* of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added).

The phrase "other than those enumerated in subsection (a) of this section" in Subsection (b) makes it as clear as words can that taxes prohibited by the language of Subsection (a) are not permitted by Subsection (b). The very presence of this phrase in Subsection (b) precludes the existence of the "seeming contradictions" between Subsection (a) and Subsection (b) on which the opinion of the Hawaii Supreme Court was based.[8]

[8] In addition, the Hawaii decision's conclusion that there are "seeming contradictions" between Subsections (a) and (b) and that 49 U.S.C. § 1513 prohibits only taxes on passengers and other users of airline services and not taxes on airlines flies in the face of an applicable rule of construction of federal statutes. In construing a federal statute, a court is obliged to give effect to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); United States v. Campos-Serrano, 404 U.S. 293, 301 n.14 (1971); United States v. Menasche, 348 U.S. 528, 538-39 (1955). The Hawaii decision's conclusion that there is a "seeming contradiction" between Subsections (a) and (b) wholly ignores the phrase in Subsection (b) providing that certain taxes "other than those enumerated in" Subsection (a) are permitted, which phrase precludes any claimed possible conflict between Subsections (a) and (b). Also, the Hawaii decision's conclusion that 49 U.S.C. § 1513 only prohibits taxes on passengers and other users of airline services but not taxes on airlines completely disregards the prohibition in Subsection (a) of taxes "on the sale of air transportation or on the gross receipts derived therefrom," both of which types of taxes are imposed on airlines, not on passengers or users. The Hawaii decision interprets 49 U.S.C. § 1513 as if these clauses were not in the statute. Giving effect to all the words of 49 U.S.C. § 1513 mandates a conclusion that such Section prohibits the PSC tax.

Subsection (b) confirms that as long as a tax is not "enumerated in" Subsection (a) it is permitted, and notes that many state revenue sources (property taxes, net income taxes, franchise taxes, and sales and use taxes on the sale of goods and services) are not affected by Subsection (a). In this latter respect, Subsection (b) records the careful counter-balancing of the federal interest in the development of an economically viable and safe national system of airport and airway development with the state authority and revenue concerns that is inherent in the statutory scheme. Accordingly, since the PSC tax is prohibited by Subsection (a), it is not permitted by Subsection (b).

Authorities relating to state taxes such as the PSC tax uniformly have followed the plain meaning of 49 U.S.C. § 1513 and held that taxes enumerated in Subsection (a) are prohibited without regard to the subordinate provisions of Subsection (b). In *State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1980), a transaction privilege tax of one percent (1%) of the gross proceeds of sale or gross income from the business of transporting persons by aircraft which by the terms of the statute was levied, among other things, "to reduce or eliminate the annual tax levy on property for state and county purposes" was voided under 49 U.S.C. § 1513 and the Supremacy Clause. The opinion in *Cochise Airways* rejected a contention that the subject tax was a sales tax "on the sale of goods or services" permitted by Subsection (b) because of the dominance of Subsection (a)'s prohibition, noting that any other construction would require a conclusion that 49 U.S.C. § 1513 was self-contradictory. 128 Ariz. at 437, 626 P.2d at 601. Similarly, in *Air Transport Association of America v. New York State Department of Taxation and Finance*, No. 43719 (N.Y. Sup. Ct., App. Div., 3d Dep't Jan. 20, 1983), set forth in Appendix B hereto, a state franchise tax of three-quarters of one percent (¾%) of gross earnings of corporations engaged in the conduct

of aviation was held void under Subsection (a), notwithstanding the fact that franchise taxes are among the types of taxes specifically listed in Subsection (b), on the basis that Subsection (a)'s prohibition controls over the subordinate provisions of Subsection (b). A similar result was reached in Ohio Attorney General's Opinion No. 73-117 (Nov. 20, 1973), set forth in Appendix C hereto, with respect to an Ohio airline excise tax of four percent (4%) of receipts derived from transportation of persons by air. These authorities confirm that the PSC tax is prohibited by Subsection (a).[9]

The PSC tax is clearly and unmistakably prohibited by the plain meaning of 49 U.S.C. § 1513. It is a tax under Subsection (a). Its measure, gross income from the airline business, as evidenced by the PSC tax law, the PSC tax return and the instructions thereto (J.A. 36-51), is gross receipts derived from the sale of air transportation or the carriage of persons traveling in air commerce. A tax so measured is prohibited whether levied or imposed directly or indirectly, and the PSC tax is

[9]Other decisions under 49 U.S.C. § 1513 confirm the counter balancing of federal and state interests and the continuation of certain state revenue sources inherent therein. For example, a 4% sales tax on the value of prepared meals purchased by two airlines from a catering firm was sustained in Air Jamaica, Ltd. v. Florida, 374 So.2d 575 (Fla. App. 1979). This tax was acceptable as a sales tax "on the sale of goods" that was not enumerated in and prohibited by Subsection (a). Also, in Airway Arms, Inc. v. Moon Area School District, _____ Pa. _____, 446 A.2d 234 (1982), *appeal dismissed*, No. 82-563, 51 U.S.L.W. 3507 (Jan. 10, 1983), taxes on fees and charges for vehicle parking in and about airports were sustained. Finally, in Island Aviation, Inc. v. Guam Airport Authority, Civil Case No. 81-00063 (Memorandum Order Oct. 4, 1982), service charges imposed by the Guam Airport Authority to cover costs of operations and maintenance of a sterile room holding service and a departure facility, to the extent reasonable for such purposes, were sustained by the District Court for the Territory of Guam under the second clause of Subsection (b). The second clause of Subsection (b) is not at issue in this case, only the first clause of Subsection (b) and its unmistakable deference to Subsection (a).

imposed directly on such prohibited measure.[10] The PSC tax is also prohibited by Subsection (a) as a tax directly or indirectly on the carriage of persons traveling in air commerce and as a tax directly or indirectly on the sale of air transportation. Since the PSC tax is enumerated in and prohibited by Subsection (a), it is not and cannot be permitted by Subsection (b). As noted by the United States of America, "the Hawaii Tax is a flagrant violation of federal law." Brief for the United States of America as Amicus Curiae (filed before the noting of probable jurisdiction herein), at 1-2.

The PSC tax does what Congress has specifically and unambiguously prohibited in 49 U.S.C. § 1513—that is, it imposes a tax on gross receipts derived from the carriage of persons traveling in air commerce or the sale of air transportation. Under the Supremacy Clause, clear and unambiguous commands of Congress invalidate contrary state legislation. This Court so held in a recent tax case which was presented in a setting markedly similar to the instant case, *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 146 (1979). In that case, this Court held that a federal statute and the Supremacy Clause invalidated a state tax. The federal statute therein prohibited state taxes on the generation or transmission of electricity which discriminated against out-of-state producers, sellers or consumers, directly or indirectly. The subject tax which was invalidated applied at a 2% rate to energy generated for interstate and intrastate consumption, but effectively credited intrastate producers or sellers so as to result in no extra state tax burden to

[10] The PSC tax is not a property tax by its terms and is not a property tax under applicable authorities. *See* Opening Brief of Taxpayer-Appellant Hawaiian Airlines, Inc. in the Hawaii Supreme Court 20-24, 26-30, Rec. 202-206, 208-218.

Also, a recent Hawaii Supreme Court decision held that travel agents' commissions retained by the agents on ticket sales are an includible part of an airline's "taxable gross income" subject to the PSC tax. In re tax Appeal of Aloha Airlines, Inc., 56 Haw. 526, 547 P.2d 586 (1976).

them. 441 U.S. at 149-50. This Court held that the tax was prohibited by the language of the federal statute, notwithstanding a New Mexico Supreme Court decision that the statute was not applicable to the tax and a State of New Mexico argument that the federal statute should be applied to the entire tax structure of the State and not just to the subject tax statute. 441 U.S. at 149; *Arizona Public Service Co. v. O'Chesky*, 91 N.M. 484, 576 P.2d 291 (1978). This Court rejected the latter argument as it was contrary to the language of the subject federal statute. 441 U.S. at 150. As was the case in *Arizona Public Service Co. v. Snead*, this case must be decided on the basis of the language of the federal statute (49 U.S.C. § 1513). *See also First Agricultural National Bank v. Tax Commission*, 392 U.S. 339, 343-44 (1968); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

The Hawaii Supreme Court has ignored the plain meaning of the language of 49 U.S.C. § 1513, and rendered the prohibition in Subsection (a) meaningless, except for head and other taxes on passengers. In substance, based on a manifestly erroneous premise of "seeming contradictions," the Hawaii decision is nothing more than a disagreement with the wisdom and reasonableness of Congress expressed in 49 U.S.C. § 1513. This is not an appropriate area of inquiry for a state court. The language of 49 U.S.C. § 1513 which prohibits the PSC tax must be given effect.

2. THE LEGISLATIVE HISTORY OF 49 U.S.C. § 1513 CONFIRMS THAT SUCH SECTION WAS INTENDED TO PROHIBIT TAXES SUCH AS THE PSC TAX.

Although resort to legislative history is unnecessary in the instant case because of the plain and unambiguous meaning of

the language of 49 U.S.C. § 1513,[11] the legislative history of 49 U.S.C. § 1513 provides illumnating confirmation that Congress intended on enactment thereof to prohibit taxes on gross receipts such as the PSC tax. This legislative history directly contradicts the determination by the Hawaii Supreme Court that Congress intended to limit the prohibition of 49 U.S.C. § 1513 to taxes on passengers and other users of the aviation system. J.S. App. A-22—A-24.[12]

The legislative history of 49 U.S.C. § 1513 commenced in 1970 with the creation of a national airport and airway development fund and the adoption of a federal air transportation tax "upon the amount paid for taxable transportation . . . of any

[11] Because the language of 49 U.S.C. § 1513 is clear and unambiguous in its prohibition of taxes such as the PSC tax, both judicial application of rules of construction and resort to legislative history to resolve uncertainties or ambiguities that do not exist are unwarranted. Howe v. Smith, 452 U.S. 473, 483 (1981); Tennessee Valley Authority v. Hill, 437 U.S. 153, 184n.29 (1978); Kuehner v. Irving Trust Co., 299 U.S. 445, 449 (1937); Fairport, Painesville, & E. R.R. v. Meredith, 292 U.S. 589, 594 (1934); Wilbur v. United States, ex rel. Vindicator Consolidated Gold Mining Co., 284 U.S. 231, 237 (1931).

[12] In determining that the PSC tax on airline passenger revenue was not invalidated by 49 U.S.C. § 1513 and the Supremacy Clause, the Hawaii decision employed what may be characterized as an "implicit preemption" analysis rather than an "express preemption" analysis. *See* Fidelity Federal Savings and Loan Association v. de la Cuesta, 102 S. Ct. 3014, 3022 (1982); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 391 (1978). The "implicit preemption analysis" employed in the Hawaii decision would be appropriate in cases where the issue is whether Congress has implicitly prohibited state regulation by enactment of federal regulations concerning the same subject matter. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (question whether Federal regulations regarding grain warehouses invalidated state regulations regarding grain warehouses); Hines v. Davidowitz, 312 U.S. 52 (1941) (question whether Federal Alien Registration Act invalidated state statute requiring alien registration). The instant case, however, involves an express prohibition of state law, not a possible implicit prohibition. 49 U.S.C. § 1513 commences with an express prohibition, *i.e.*, "No State . . . shall." In such a case, the "implicit preemption analysis" set forth in *Rice* and *Hines* and employed in the Hawaii decision simply does not apply. Rather, the only question at issue is whether the state statute falls within the express federal preemption. *See* Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979); First Agricultural National Bank v. Tax Commission, 392 U.S. 339 (1968).

person" as one of three sources of revenue designed to provide "commercial aviation's share of the cost of the federal activities." *See Massachusetts v. United States*, 435 U.S. 444, 451 (1978); 26 U.S.C. §§ 4261, 4262 (a portion of the Airport and Airway Revenue Act of 1970).[13] This federal air transportation tax was measured by a percentage of all domestic passenger fares, *i.e.*, an airline's gross receipts. 26 U.S.C. § 4261(a).

The first draft of what was to become 49 U.S.C. § 1513, H.R. 2337, was introduced on January 26, 1971,[14] as a bill "to prohibit State taxation of the carriage of persons in air transportation." It provided a prohibition of taxes on airlines, as follows:

> Sec. 1112. No State . . . shall levy or collect a tax, fee or other charge, directly or indirectly, on the carriage of persons in air transportation . . . .

The second draft, in two identical bills, H.R. 14847 and H.R. 14991, was introduced on May 9 and 16, 1972. In relevant part, it was the same as the first draft except for the addition of the language italicized below:

> Sec. *1113*. No State . . . shall levy or collect a tax, fee or other charge, directly or indirectly, on *persons traveling in air transportation or* the carriage of persons in air transportation . . .

What was in effect the third draft of the bill, S. 3755, introduced on June 27, 1972, added several additional prohibitions, all italicized below:

> Sec. 1113. No State . . . shall levy or collect a tax, fee, *head charge* or other charge, directly or indirectly, on

[13] To be precise, the legislation increased an existing tax upon taxable transportation of persons and imposed a similar tax on the transportation of property.

[14] This first draft was also subsequently introduced in the Senate on May 16, 1972 as S. 3611.

> persons traveling in air transportation or the carriage of persons in air transportation, *or on the gross receipts derived therefrom, provided, however, that nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated above, including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof)* . . . .

First and most significantly, the third draft added as a specific additional category of prohibited taxes, taxes "on the gross receipts derived" from persons traveling in air transportation or from the carriage of persons in air transportation. This language was added after Whitney Gillilland, Vice Chairman of the Civil Aeronautics Board, called to the attention of House and Senate Subcommittees in testimony an Ohio tax on the "gross receipts of airline business done in Ohio."[15] The Ohio tax was labeled a privilege tax much as the PSC tax is labeled a means of taxing personal property, but the language in Subsection (a) barring gross receipts taxes was included specifically to prohibit taxes like the Ohio tax and the PSC tax based on gross receipts. Second, head charges were added to the ever-expanding enumeration of prohibited taxes. This was in response to this Court's approval on constitutional grounds of head taxes in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 720 (1972). Finally, the third draft introduced the provision that certain taxes "other than those

[15] *See Air Passenger Fees–State and Local Charges: Hearings on H.R. 2337 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 52-59 (1972) (testimony of Hon. Whitney Gillilland, Vice Chairman, Civil Aeronautics Board); *Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 3611 etc. Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 137 (1972) (testimony of Hon. Whitney Gillilland, Vice Chairman, Civil Aeronautics Board).

enumerated above, including property taxes . . .," etc., were not prohibited. The initial location of this provision is significant because the prohibition, the permission and the exception to the permission deferring to the prohibition (*i.e.*, "other than those enumerated above") were all part of a single statutory sentence. This is a clear indication of the subordination of the permission to the prohibition. The third draft was "favorably reported with one substantive and numerous technical drafting amendments" by the Senate Committee on Commerce on June 28, 1972.[16] The substantive change related to airport development grants and has no relevance herein. The "technical and drafting changes" relating to 49 U.S.C. § 1513 included division of the single paragraph provision into two paragraphs [Subsection (a) and Subsection (b)] and adopting the language that is now 49 U.S.C. § 1513.

There were no further changes in the language of the statute, although 49 U.S.C. § 1513 was not enacted until one year later, in June 1973. On October 5, 1972, a Conference Report stated that the Senate version of the bill (the third draft) was acceptable to the House.[17] The Senate and the House both passed the bill as reported by the Conference Committee, but it was pocket-vetoed by President Nixon on October 27, 1972, at the end of the 92d Congress.[18]

[16]This third draft is significant since the applicable Committee Report stated that subsequent changes in 49 U.S.C. § 1513 were "of a technical or drafting nature and do not reflect substantive changes in the bill." S. REP. NO. 92-1005, 92d Cong.,2d Sess. 7 (1972).

[17]H.R. REP. NO. 92-1543, 92d Cong., 2d Sess. 4-5 (1972).

[18]The pocket veto was of the entire bill for reasons unrelated to the state tax prohibition provision with which we are concerned.

On the reconvening of the 93d Congress in January 1973, several bills were reintroduced which copied one or another of the 1972 drafts of the bill.[19]

The Senate, as noted in a February 1, 1973 report of the Senate's Commerce Committee, adopted again as S.38 the language of the statute pertinent to this appeal that the Conference Committee had agreed on in 1972.[20]

The House Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce held hearings in March 1973 on the airport development program. Once again, the Ohio tax on gross receipts of airlines was brought to Congress' attention. Theodore Koetz, Deputy Tax Commissioner of Ohio, testified in an attempt to avoid federal statutory prohibition of the Ohio 4% gross receipt tax on airlines.[21] Congress, however, refused to act on Mr. Koetz's recommendations and enacted the bill without substantial changes.[22] In the course of these hearings, Hawaii was also mentioned as a state which may impose a gross receipts tax on

[19] *See* H.R. 627, 93d Cong., 1st Sess. (introduced Jan. 3, 1973); H.R. 1784, 93d Cong., 1st Sess. (introduced Jan. 11, 1973); H.R. 2695, 93d Cong., 1st Sess. (introduced Jan. 23, 1973); S. 38, 93d Cong., 1st Sess. (introduced Feb. 6, 1973); H.R. 4082, 93d Cong., 1st Sess. (introduced Feb. 7, 1973); H.R. 4214, 93d Cong., 1st Sess. (introduced Feb. 8, 1973); H.R. 4182, 93d Cong., 1st Sess. (introduced Feb. 8, 1973); H.R. 4213, 93d Cong., 1st Sess. (introduced Feb. 8, 1973).

[20] *See* S. REP. NO. 93-12, 93d Cong., 1st Sess. 6, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 1434, 1436-37.

[21] *See Airport Development Acceleration Act of 1973: Hearings on H.R. 4082 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 246-253 (1973) (testimony of Theodore Koetz, Deputy Tax Commissioner, State of Ohio).

[22] *See* H.R. REP. NO. 93-157, 93d Cong., 1st Sess. 2-3 (1973) indicating that the only relevant amendment to the bill related to the extension from July 1, 1973, to December 31, 1973, of the period of time within which certain taxes were exempt from the provisions of Subsection (a). The Conference Report followed this amendment. *See* H.R. REP. NO. 93-225, 93d Cong., 1st Sess. 5-6 (1973).

airline ticket sales.[23] The history of 49 U.S.C. § 1513, then, shows Congressional intent to prohibit broad categories of taxes, to prohibit taxes in addition to head taxes and to prohibit taxes imposed on airlines such as the PSC tax.

Another statement in the legislative history confirms that the broad prohibition of Subsection (a) was intentional. As noted by the Vice Chairman of the Civil Aeronautics Board in hearings in 1972:

> The devisers of taxes are pretty ingenious. I think we would find all sorts of taxes of this sort applied in different ways and with different measures, all over the country if something isn't done, and this would create an enormous burden on the movement of traffic and this is the thing that needs to be addressed.[24]

Other legislative history is also significant. Because of the then recent *Evansville* decision, considerable discussion in the legislative history centers on passenger head taxes. Such legislative history, however, fails to evidence any intent to confine the prohibitory terms of 49 U.S.C. § 1513 just to passenger head taxes. *See State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). Rather, it is clear that passenger head taxes were merely added to an already expan-

[23]The reference in the hearings to Hawaii was inaccurate to the extent that it described the 4% tax on gross receipts from airline ticket sales as legislation being considered rather than, as was then the case, a tax which had been in effect in its then existing form for nearly 10 years. The report characterizes the Hawaii tax (which is, or is equivalent to, the PSC tax herein) as a "head tax" and confirms Congressional intent to prohibit taxes such as the PSC tax. *See Airport Development Acceleration Act of 1973: Hearings on H.R. 4082 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 260 (1973) (statement of John A. Nammack, Executive Vice President, National Association of State Aviation Officials).

[24]*Air Passenger Fees–State and Local Charges: Hearings On H.R. 2337 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 55 (1972) (testimony of Hon. Whitney Gillilland, Vice Chairman, Civil Aeronautics Board).

sive list of prohibited taxes, fees and other charges in response to the *Evansville* decision. The intention was to *broaden* the prohibition of 49 U.S.C. § 1513, not to narrow it. To accomplish its goal of prohibiting all state and local taxation of the carriage of passengers traveling in air commerce, Congress was aware that broad statutory language was necessary. Accordingly, broad statutory language was used in 49 U.S.C. § 1513(a) and, until the Hawaii Supreme Court's decision, such language had been given its full force and effect.[25]

Even in its discussion of passenger head taxes, the legislative history reflects Congress' awareness that, economically, it makes no difference whether a tax is imposed on the passenger or on the airline. As stated in the report of the Senate Commerce Committee:

> Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel.
>
> If the passenger must pay a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers . . . it still will lead to increased air travel costs. If the air carriers had to absorb $1 for every air passenger carried last year, that would amount to $170 million. The airlines could not reasonably be expected to bear such a burden. In the end, a fare increase would have to be implemented. Thus, the air passenger loses either way on State and local head taxes . . . .[26]

By interpreting 49 U.S.C. § 1513 as prohibiting only taxes imposed directly on passengers or other users, the

[25] State v. Cochise Airlines, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1980); Air Transportation Association of America v. New York State Department of Taxation and Finance, No. 43719 (N.Y. Sup. Ct., App. Div. 3d Dep't Jan. 20, 1983); Ohio Op. Att'y Gen. No. 73-117 (Nov. 20, 1973).

[26] S. REP. NO. 93-12, 93d Cong., 1st Sess. 22 (1973), *reprinted in* [1973] U.S. CODE CONG. & ADMIN. NEWS 1434, 1451, 1455.

Hawaii Supreme Court disregarded key portions of applicable legislative history and Congressional intent to prohibit taxes on gross receipts such as the PSC tax. The Hawaii Supreme Court's construction of 49 U.S.C. § 1513 is not supported by its legislative history. Further, the Hawaii Supreme Court's conclusion that Congress intended to limit the prohibition in 49 U.S.C. § 1513 to taxes on passengers and users of the aviation system (J.S. A-21—A-24) is plainly erroneous.

Reversal of the Hawaii Supreme Court's decision is required to vindicate the substance of Congress' command in 49 U.S.C. § 1513(a) in accordance with its plain language and legislative history.

3. THE HAWAII DECISION SUBVERTS A FEDERAL STATUTORY SCHEME OF TAXATION AND SUPPORT TO AIRPORT AND AIRWAY DEVELOPMENT WITH IMMEDIATE NATIONWIDE IMPLICATIONS.

49 U.S.C. § 1513 was enacted as a part of a uniform national system of taxation and support for airport and airway development and safety in the Airport Development Acceleration Act of 1973. Prior legislation had established a funding base for such development and imposed an 8% tax on the price of domestic air passenger tickets. *State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). 49 U.S.C. § 1513's prohibition of state taxation was intended in part to protect revenues subject to this federal tax and to establish nationwide tax uniformity:

> In accepting a greater Federal role and responsibility in airport development the Committee has also acted to prohibit local taxation on passengers or on the carriage of passengers. We believe such taxation to be inimical to the

development of a *national system funded in large part by uniform federal taxes* . . . .

Nonetheless, the Committee views S. 38 as an aviation development package—the components of which cannot be separated . . . If local taxes on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a federal airport development program . . . .

Therefore, by prohibiting state taxation on passengers or on air transportation, the Committee has accepted greater responsibility for U.S. assistance, believing that the two actions must be viewed together and that neither should stand alone without the other. S. REP. NO. 93-12, 93d Cong., 1st Sess. 26, *reprinted in* [1973] U.S. CODE CONG & AD. NEWS 1434, 1455 (emphasis added).

The Airport Development Acceleration Act of 1973 which included 49 U.S.C. § 1513 reflected a delicate balancing of federal and state interests. A federal interest in the development of an economically viable and safe national system of air transportation and the need for funding thereof were weighed in light of obvious state revenue interests.[27] Careful regard for these state revenue interests is reflected in Subsection (b)'s specification of state revenue sources not affected by the federal taxing prohibition. This regard is also reflected in the fact that taxes prohibited by Subsection (a) were limited to taxes, such as the PSC tax, which could adversely affect the ability of the previously adopted federal taxes to provide adequate revenue for the support of the uniform national system of air transportation.

[27] *See* S. REP. NO. 93-12, 93d Cong., 1st Sess. 6-22 (1973), *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 1434, 1437-1451.

The uniform national system of taxation and support for airport and airway development established in the 1973 Act has been subverted by the Hawaii decision. If the Hawaii decision is not reversed, it will provide a path to be followed by other jurisdictions wishing to evade the prohibition contained in 49 U.S.C. § 1513. In this regard, 49 U.S.C. § 1513 has to date been held to preclude taxes substantively similar to the PSC tax in Ohio, Arizona and New York.[28] Two additional cases with similar issues are now pending in Alaska.[29] Further, the tax laws of several other states pose the potential of litigation based on the contrived analysis found in the Hawaii decision.[30] If the Hawaii decision is not invalidated, a specific concern of Congress will be realized:

> If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce. The national system of air service upon which 180 million airline passengers depend annually would become a hodgepodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines. The committee bill prohibits State and local taxation of air fares, but this Federal preemption is

[28] *See* authorities cited in note 25, *supra*.

[29] Wien Air Alaska v. State of Alaska, Department of Revenue, No. 3AN 81-8582 (Alaska Super. Ct., 3d Jud. Dist., filed Dec. 10, 1981) and Alaska Aeronautical Industries, Inc. v. State of Alaska, Department of Revenue, No. 3AN 81-4286 (Alaska Super. Ct., 3d Jud. Dist., filed June 22, 1981).

[30] *See* DEL. CODE ANN. tit. 30, §§ 2301(d), (e) (Supp. 1982); IND. CODE ANN. §§ 6-2.1-2-2, 6-2.1-2-5 (Burns 1978 & Supp. 1982); MD. (TAX & REV.) CODE ANN., art. 81, §§ 129-30 (1980 & Supp. 1982); OKLA. STAT. ANN. tit. 68 §§ 1354 (West 1981 Supp.); WASH REV. CODE §§ 82.16.010-82.16.020 (1981); W. VA. CODE § 11-12A-2 (1974 & Supp. 1982).

carefully balanced by substantial increases in trust fund assistance for airport development and modernization. 119 CONG. REC. 3350 (1973) (comments of Senator Pearson). Reversal of the Hawaii decision is required to preclude the subversion of the uniform national system of taxation and support for airport and airway development established by the 1973 Act.

4. THE 1982 AMENDMENT TO 49 U.S.C. § 1513 SUPPORTS THE CONCLUSION THAT TAXES SUCH AS THE PSC TAX ARE PROHIBITED BY 49 U.S.C. § 1513.

49 U.S.C. § 1513 was amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. No. 97-248, 96 Stat. 324) ("TEFRA"), effective September 3, 1982. Title V of TEFRA is designated as the Airport and Airway Improvement Act of 1982 (96 Stat. 671-702). The principal change to 49 U.S.C. § 1513 effected by TEFRA is the addition of a further prohibition by new Subsection (d) to such section. The language of Subsection (b) was altered in form to reflect the addition of new Subsection (d). The full text of 49 U.S.C. § 1513, including the 1982 amendment, is reprinted in Appendix A to this brief.

The amendment of 49 U.S.C. § 1513 by TEFRA does not change the unmistakable prohibition of the PSC tax by Subsection (a) or the fact that Subsection (b) only permits taxes which are not prohibited by Subsection (a). Any assertion, such as that set forth in Appellee's Motion to Dismiss or Affirm in No. 82-586 in this Court at 10-11, that the amendment somehow permits the PSC tax for tax years not involved herein is manifestly wrong. As an initial matter, Subsection (a) is entirely unaffected by the amendment. The relevant language of Subsection (b) also is unaffected. The relationship between those

two provisions, therefore, and in particular the subordination of Subsection (b) to Subsection (a), remains unchanged. Nothing in the TEFRA amendment authorizes a state tax on gross receipts which hides behind a "property tax" label. Additionally, such amendment only applies to years subsequent to those involved in this appeal.[31]

[31]The relevant portion of 49 U.S.C. § 1513(d) states:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> . . . .
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

As observed in part by the dissenting opinion below (J.S. App. A-26), Hawaii does not have a personal property tax today, did not have one in 1962 when the Hawaii tax statute at issue here was enacted, and has not had one since 1947. (The Hawaii public service company tax at issue here is, by its own terms, "in lieu of the tax imposed by Chapter 237 but is not in lieu of any other tax." HAW. REV. STAT. § 239-6 (1976). Chapter 237 is a general excise tax, collected as a percentage of gross income. It is not a personal property tax. As noted, Hawaii has no personal property tax that the PSC tax could be "in lieu" of.) In comparison with "the tax rate applicable to commercial and industrial property in the same assessment jurisdiction," which rate is zero, any so-called "property" tax applied to the airlines is obviously larger, and therefore contrary to new Subsection (d) of 49 U.S.C. § 1513.

Further, any claim to the effect that the PSC tax is clearly non-discriminatory as a tax levied equally upon all Hawaii public service carriers must necessarily be based on an erroneous comparison. The TEFRA amendment to 49 U.S.C. § 1513 expressly says as much. A portion of 49 U.S.C. § 1513 (d)(2) states:

(2) In this subsection—

> . . . .
>
> (D) "commercial and industrial property" means property, *other than transportation property* and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy . . . (emphasis added).

The proper comparison is not with motor carriers subject to the PSC tax, as such a hypothetical argument would necessarily suggest, but rather with other commercial and industrial property. Since there is no personal property tax applicable to such other property, the application of any tax of this sort on an airline by the State of Hawaii would contravene the substance of the TEFRA amendment. It cannot be justified by it.

The amendment of 49 U.S.C. § 1513 by TEFRA buttresses the conclusion that such section prohibits the PSC tax. The amendment, in new Subsection (d) of 49 U.S.C. § 1513, adds additional classes of taxes prohibited by 49 U.S.C. § 1513, and otherwise does not alter the section.[32] Specifically, the amendment forbids assessments of state property taxes against airline transportation property at values proportionately closer to fair market value than assessment values for other commercial and industrial property are to fair market value of such other property and forbids higher ad valorem tax rates for airline property than rates for such other property. The amendment also permits taxation of transactions "in lieu" of ad valorem taxes only on

[32]The prohibition of additional categories of taxes is the only purpose of the amendment described in the legislative history thereof. The amendment's apparent origin was as a part of a bill to terminate the functions of the Civil Aeronautics Board. *See* H.R. 5103, § 205(b), 97 Cong., 1st Sess. (1981). The citations below are to pertinent explanations of that bill and TEFRA. *See Effects of Airline Deregulation; and Legislation to Advance the Date for Sunset of the Civil Aeronautics Board: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 216-17, 244-45 (1981) (Testimony of Paul R. Ignatius, President, Air Transport Association of America); *Tax Equity and Fiscal Responsibility Act of 1982*, Conference Report to Accompany H.R. 4961, H.R. CONF. REP. NO. 97-760, 97th Cong., 2d Sess. 722 (1982); 127 Cong. Rec. E5694 (1981).

condition that revenues therefrom are "wholly utilized for aeronautical purposes."[33]

This amendment by TEFRA and addition of new Subsection (d) of 49 U.S.C. § 1513 represents a reconsideration of the prohibitions already included in 49 U.S.C. § 1513 and a Congressional conclusion that such prohibitions should be continued *and expanded*. It further represents reaffirmation of the careful balancing between federal and state interests reflected in 49 U.S.C. § 1513, which balancing necessitates prohibition of taxes such as the PSC tax in the interest of development of an economically feasible and safe national air transportation system.

The issue in this case, however, is the prohibition of Subsection (a), not that of Subsection (d). Subsection (a) prohibits the PSC tax.

[33] Any claim that the PSC tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes" and therefore allowed by new 49 U.S.C. § 1513(d)(3) necessarily fails. As an initial matter, all revenues from the PSC tax go into the general fund of the State of Hawaii and the use of such revenues is not limited to airport and aeronautical purposes. HAW. REV. STAT. § 239-10 (1976). [In fact, it is possible that none of such funds are used for such purposes. Hawaii's airports are financed from airport use charges and other sources separate from the PSC tax. (J.A. at 21, 22.) Between 1973 and 1978, Appellant paid use charges totaling $2,010,475 to the State of Hawaii. (*Id.*)]

Additionally, new Subsection (d)(3) of 49 U.S.C. § 1513 does not amend, limit or otherwise modify Subsection (a). Rather, Subsection (d) only limits the taxes allowed by Subsection (b). Taxes allowed by Subsection (b) before TEFRA included only taxes not "enumerated in" Subsection (a). To be allowed by Subsection (b) after TEFRA , a tax must not be enumerated in either Subsection (a) or the new Subsection (d). This is clear from TEFRA's addition of the phrase "except as provided in Subsection (d)" at the beginning of Subsection (b). Therefore, while the meaning of the words "in lieu" in Subsection (d)(3) is far from clear, it is clear that the use of such words has no relevance herein. Subsection (d)(3) merely states that Subsection (d) does not prohibit certain "in lieu" taxes.

CONCLUSION

The Hawaii Supreme Court's opinion is contrary to the plain meaning and legislative history of 49 U.S.C. § 1513. It disrupts a carefully drawn federal program for support of a national system of air transportation. The judgment of the Hawaii Supreme Court should be reversed.

Respectfully submitted,

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HAWAIIAN AIRLINES, INC.

APPENDIX A

Applicable Statutes

1. Act of Congress: Federal Aviation Act of 1958

Section 1113, as enacted in Section 7(a) of the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88, 90, and codified at 49 U.S.C. § 1513, and as amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 701[1], which provides as follows:

Prohibition; exemption.

SECTION 1113(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subdivision until December 31, 1973.

Permissible State taxes and fees.

(b) *Except as provided in subsection (d) of this section,* nothing in this section shall prohibit a State (or political subdivi-

[1]The additions made by the 1982 amendatory Act are in italics.

sion thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nonapplicability.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until December 31, 1973.

(d) (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assesed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection–

(A) "assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposed or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

2. Act of Legislature of the State of Hawaii: Public Service Company Tax Law (Chapter 239, Hawaii Revised Statutes), Section 239-6, which provides as follows:

§ 239-6 **Airlines, certain carriers.** *There shall be levied and assessed upon each airline a tax* of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, *the tax shall be three per cent of its gross income each year from the airline business*. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [the Hawaii General Excise Tax] but is not in lieu of any other tax. [Emphasis added.]

APPENDIX B

STATE OF NEW YORK — SUPREME COURT
APPELLATE DIVISION — THIRD DEPARTMENT

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

—against—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE et al.,

Appellants.

Argued, December 14, 1982.

Before: HON. T. PAUL KANE,
Justice Presiding,

HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. LEONARD A. WEISS,
HON. HOWARD A. LEVINE,
Associate Justices.

APPEAL from a judgment of the Supreme Court at Special Term (DeForest C. Pitt, J.), entered June 22, 1982 in Albany County, which, *inter alia*, granted plaintiff's motion for reargument, and, upon reargument, declared section 184 (subd. 1) of the New York State Tax Law to be unconstitutional.

ROBERT ABRAMS, Attorney-General (Francis V. Dow of counsel), for appellants, The Capitol, Albany, New York 12224.

DEBEVOISE & PLIMPTON (Andrew C. Hartzell of counsel), for respondent, 299 Park Avenue, New York, New York 10171.

OPINION FOR AFFIRMANCE

#43719

KANE, J. P.

Plaintiff is an unincorporated trade and service association consisting of 31 air carriers, 21 of whom do business in New York State. In this declaratory judgment action, plaintiff contends that section 184 (subd. 1) of the New York State Tax Law imposes a tax that is prohibited by section 1113 of the Federal Aviation Act (U. S. Code, tit. 49, § 1513) and is, therefore, unconstitutional under the supremacy clause (art. VI, cl. 2) of the United States Constitution.

Section 1113 of the Federal Aviation Act provides, in pertinent part, that:

> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly*, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . . (emphasis added).
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . .

Section 184 (subd. 1) of the Tax Law provides, *inter alia*, that:

> Every corporation . . . formed for or principally engaged in the conduct of aviation . . . for the privilege of exercising its corporate franchise, or of doing business, or of employ-

ing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, *shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state* (emphasis added).

Special Term found that section 184 (subd. 1) of the Tax Law, while called an "additional franchise tax," was, *inter alia*, "in fact a tax upon the gross receipts from sale of air transport services" and that section 1113 of the Federal Aviation Act forbids such a tax. This being the case, Special Term declared section 184 (subd. 1) of the Tax Law unconstitutional. This appeal ensued.

Defendants' central argument is that the gross earnings of section 184 (subd. 1) are not entirely composed of gross receipts from the sale of air coverage, but have other components. As such, defendants assert that the franchise tax in question, which includes gross receipts in its measurement, is permissible and, therefore, not in conflict with section 1113 since subdivision (b) of that section explicitly permits the levy of franchise taxes.

This argument must be rejected. In our opinion, the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation. Moreover, legislative history, evidenced by the various forms of the bills and hearing testimony, supports our reading of section 1113 of the Federal Aviation Act. In particular, Congress refused to adopt a suggestion by the State of Ohio to add language to subdivision (b) of section 1113 which would have permitted State taxation of fairly apportioned air carrier gross receipts (see Hearings Before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Congress, First Session).

In November, 1973, the Ohio Attorney-General issued an opinion declaring the Ohio excise tax discussed above to be in conflict with section 1113, as that section "prohibits both direct and indirect state taxation of the sale of air transportation" (Ohio Attorney-General Opn. No. 73-117). We would also note that the Court of Appeals of Arizona has held that a transaction privilege levy imposed by Arizona on air carriage measured by gross receipts of sales was impermissible as it conflicted with, and was thus preempted by, section 1113 (*State ex. rel. Arizona Dept. of Revenue v. Cochise Airlines*, 626 P 2d 596 [Ariz.]).

Defendants argue that the New York franchise tax challenged herein is distinguishable from both the Ohio tax and Arizona tax. We, however, are unable to find any meaningful distinction. The language of section 184 (subd. 1) also refers to "privilege", and defendants' argument that the measurement of the challenged tax by gross earnings is distinguishable from a direct tax on gross receipts is without substance. In this regard, the fact that section 184 (subd. 1) of the Tax Law imposes a tax on other categories of income does not alter the fact that it imposes a tax upon the gross receipts derived from air carriage.* Finally, defendants' contention that to construe the Federal statute as prohibiting the use of gross receipts in determining franchise taxes would render meaningless the explicit provision in section 1113 (subd. [b]) permitting the levy of franchise taxes by States is specious, since the measurement for the franchise tax could be structured in a different way (but see *Matter of Aloha Airlines, Inc.*, 647 P 2d 263 [Hawaii], U.S. S. Ct. app. pending).

*Plaintiff does not challenge the tax on other categories of income.

We would, therefore, agree with Special Term that section 184 (subd. 1) of the Tax Law is preempted by the subject Federal statute insofar as gross earnings are measured by gross receipts from air carriage. Special Term's judgment must, therefore, be affirmed.

The judgment should be affirmed.

APPENDIX C

Ohio Attorney General's Opinion
Number 73-117 (November 20, 1973)

Honorable Robert G. Kosydar
Tax Commissioner of Ohio
Department of Taxation
68 East Cay Street
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads in part as follows:

> Do the provisions of Section 1113 of the Federal Aviation Act of 1958 apply after December 31, 1973 to prohibit the levy, collection, and enforcement of the Ohio Airlines Excise Tax?

Before reaching your substantive question, I consider it appropriate to note that questions of this type are within the province of this office's opinions. Former Attorney Generals have advised that certain statutes conflicted with federal enactments, and therefore were superseded to the extent they were inconsistent. See Opinion No. 2065, Opinions of the Attorney General for 1933; Opinion No. 818, Opinions of the Attorney General for 1937; Opinion No. 2891, Opinions of the Attorney General for 1962.

The rationale for these opinions can be summed up that the Attorney General is required by his oath of office to support and defend the Constitution of the United States of America. When and if there is a conflict between the state law and the federal law in areas where the federal law is applicable, the Supremacy Clause controls and the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See *Ex parte Young*, 209 U.S. 123, 150-169

(1908); *Delchamps, Inc. v. Alabama State Milk Control Board*, 324 F. Supp. 117, 118 (1971); *Whitehill v. Eklins*, 258 F. Supp. 589, 596 (1966) and cf. *Hansen v. Barlow*, 456 P.2d 177, 181 (1969).

On June 18, 1973, the President signed into law the "Airport Development Acceleration Act of 1973" (P.L. 93-44). Of particular importance is Section 7 (A) of this act which amends Title XI of the Federal Aviation Act of 1958 to read as follows:

[Text of 49 U.S.C. § 1513 omitted]

The problem posed by your question is to determine whether the language of Section 1113 of the Federal Aviation Act is inclusive of the Ohio Airlines Excise Tax. The authority for the establishment of the Ohio Airlines Excise Tax is provided by R.C. 5745.02 which states in part:

> [A]n excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons or property by air within this state.
>
> The tax is as follows:
>
> (A) Four per cent of the receipts derived from transportation which begins and ends within this state;
>
> (B) Where the transportation does not begin and end within this state, four per cent of the receipts derived therefrom attributable to business carried on within this state based on the proportion of the mileage within the state to the entire mileage over which the persons or property are transported, into or out of the state.
>
> All moneys received in the state treasury from the tax levied in this section shall be deposited to the credit of the general revenue fund.

Upon examination of the language of Section 1113 of the Federal Aviation Act of 1958, it becomes readily apparent that it provides a broad and inclusive prohibition of certain taxes on air commerce levied by state governments. The provisions

reached much further than the prohibition of individual "head taxes." Rather, Section 1113 prohibits both direct and indirect state taxation of the sale of air transportation. Section 1113 clearly states that:

> No state . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage or persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . .

The language of this section is clearly inclusive of the Ohio Airlines Excise Tax (R.C. 5745.02) which by its terms falls within the category of a tax upon the gross receipts derived from the sale of air transportation.

The power to regulate air commerce is vested in the federal government by the commerce clause of the United States Constitution (Article I, Section 8, U.S. Constitution), and such regulatory power is expressed by the Federal Aviation Act of 1958. Upon examining the federal regulatory power, it is clear that any power which the states have exercised over interstate commerce by reason of congressional inaction ceases to exist the moment Congress asserts its authority over interstate commerce through the enactment of legislation that conflicts with or covers the same subject as a state statute.

In the case of *United Airlines v. Porterfield*, 28 Ohio St.2d 97 (1971), the Ohio Supreme Court held that the Ohio Airlines Excise Tax was not violative of the Ohio and United States Constitutions as an undue interference with interstate commerce. However, at the time that case was decided, Congress had taken no action on the question of state taxation of air commerce. Congress has since acted on the taxation problem with the enactment of Section 1113 of the Federal Aviation Act of 1958 which prohibits state taxation of the sale of air transportation. Section 1113 also provides that those taxes which

were in force prior to May 21, 1970 are exempted from the provisions of the section until December 31, 1973.

Because of the broad language of Section 1113 of the Federal Aviation Act of 1958, the Ohio Airlines Excise Tax (R.C. 5745.02) falls within the provisions of Section 1113 and must be discontinued as of December 31, 1973.

In specific answer to your request it is my opinion and you are so advised that:

1. The Attorney General may advise that a state statute is invalid insofar as it conflicts with a federal statute.

2. The provisions of Section 1113 of the Federal Aviation Act of 1958 apply after December 31, 1973, to prohibit the levy, collection, and enforcement of the Ohio Airlines Excise Tax, R.C. 5745.02.

Respectfully,

WILLIAM J. BROWN
Attorney General